INDEX

Subject Index

Page

Brief opposing motion to dismiss 1

Table of Cases Cited

Albertson v. *Wallace*, 81 N. C. 479, 103 ALR 26 7

American Mfg. Co. v. *St. Louis*, 205 U. S. 462, 33 L. Ed. 1087, 39 Sup. Ct. 522 5

Andrews v. *Andrews*, 188 U. S. 14, 47 L. Ed. 366 16

Andrews v. *Virginia R. Co.*, 248 U. S. 272, 63 L. Ed. 236 17

Armour & Co. v. *Virginia*, 246 U. S. 1, 62 L. Ed. 547 7

Bethlehem Motors Corporation v. *Flynt*, 256 U. S. 421 65 L. Ed. 1029 14

Best & Company v. *Maxwell*, 311 U. S. 454, 85 L. Ed. 275 14

Blythe v. *Hinkley*, 31 Sup. Ct. 390, 45 L. Ed. 557 16

Brown v. *Piper*, 91 U. S. 37, 23 L. Ed. 200 4

Caldwell v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336 14

Chicago Great Western Ry. Co. v. *Besham*, 249 U. S. 164, 63 L. Ed. 534 ..... 15, 17

Chicago, R. I. and Pac. R. Co. v. *Devine*, 239 U. S. 52, 60 L. Ed. 140 15

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292, 62 L. Ed. 295 ..... 10, 13

Cudahy Packing Co. v. *Minnesota*, 246 U. S. 450, 62 L. Ed. 827 9

Curren v. *Wallace*, 306 U. S. 1, 83 L. Ed. 441 5

Dept. of Treas. v. *Preserving Corp.*, 313 U. S. 62, 85 L. Ed. 1188 6

Freeman v. *Hewitt*, 12 L. W. 4077 ..... 10, 11

Galveston H. & S. A. Ry. Co. v. *Texas*, 210 U. S. 217, 52 L. Ed. 1031 9

General Trading Co. v. *State Tax Comm.*, 322 U. S. 335, 88 L. Ed. 275 ..... 6, 12

Page

Gregg Dyeing Co. v. *Query*, 286 U. S. 472, 76 L. Ed. 1232 8
Gwinn, White & Prince, Inc., v. *Henneford*, 305 U. S. 434, 83 L. Ed. 272 ..... 3, 10, 11, 12
Hartford Acc. & Indem. Co. v. *Nelson Mfg. Co.*, 291 U. S. 352, 78 L. Ed. 840, 54 Sup. Ct. 392 3
Henneford v. *Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814 ..... 6, 11, 12
Hicklin v. *Coney*, 290 U. S. 169, 78 L. Ed. 247, 54 Sup. Ct. 142 3
Hunter v. *City of Pittsburgh*, 207 U. S. 161, 52 L. Ed. 151 16
International Harvester Co. v. *Dept. of Treasury of Indiana*, 322 U. S. 340, 88 L. Ed. 1313 7
J. Bacon & Sons v. *Martin*, 305 U. S. 380, 83 L. Ed. 233 ..... 3, 15
J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307, 82 L. Ed. 1865 ..... 10, 11, 12
Kansas City, Ft. S. & M. R. Co. v. *Botkin*, 240 U. S. 227, 60 L. Ed. 617, 36 Sup. Ct. 261 3
Leloup v. *Mobile*, 127 U. S. 640, 32 L. Ed. 311 10
Lemke v. *Farmers Grain Co.*, 258 U. S. 50, 56 L. Ed. 458 5
Louisville & Nashville R. Co. v. *Welton*, 218 U. S. 36, 54 L. Ed. 921 16
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 ..... 6, 12
McLeod v. *Dilworth*, 322 U. S. 327, 88 L. Ed. — 5, 11
Meyer v. *Wells, F. & Co.*, 223 U. S. 298, 56 L. Ed. 445 9
Nelson v. *Sears Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888 ..... 6, 12
Nesbitt v. *Gill*, 227 N. C. 174 ..... 3, 4
Northwest Airlines v. *Minnesota*, 322 U. S. 291, 88 L. Ed. 1283 9
Offield v. *N. Y., N. H. & H. Co.*, 203 U. S. 372, 51 L. Ed. 231 16
Ohio Bell Telephone Co. v. *Public Utilities Comm.*, 301 U. S. 292, 81 L. Ed. 1093 4
Parker v. *Brown*, 317 U. S. 341, 87 L. Ed. 315 4

BLEED THROUGH– POOR COPY

Page

P. A. Schulte, Inc., v. *Gangi*, 326 U. S. 712, 90 L. Ed. 1113 4
Philadelphia & S. M. S. S. Co. v. *Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1203 10
Richfield Oil Corp. v. *State Board of Eq.*, 91 L. Ed. 123 3
St. Louis S. W. R. Co. v. *Arkansas*, 235 U. S. 350, 59 L. Ed. 265, 35 Sup. Ct. 99 3
Schafer v. *Farmers Grain Co. of Eubden*, 268 U. S. 189, 69 L. Ed. 909 5
Sligh v. *Kirkwood*, 237 U. S. 52, 59 L. Ed. 835 4
Sonneborn Bros. v. *Keeling*, 262 U. S. 506, 67 L. Ed. 1095 6
Southern Railway Co. v. *Clift*, 260 U. S. 16, 67 L. Ed. 283 17
Supreme Lodge K. P. v. *Meyer*, 265 U. S. 30, 68 L. Ed. 885, 44 Sup. Ct. 432 3
Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250, 82 L. Ed. 823 5

STATUTES CITED

Constitution of North Carolina, Section 3 2
Revenue Act of North Carolina of 1939, Section 115 .. 2

BLEED THROUGH- POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 132

P. M. NESBITT,

Appellant,

vs.

EDWIN M. GILL, COMMISSIONER OF REVENUE OF NORTH CAROLINA

BRIEF OPPOSING MOTION TO DISMISS

P. M. Nesbitt, Appellant of this appeal to the Supreme Court of the United States for writ of error to the Supreme Court of North Carolina submits this its brief opposing motion to dismiss heretofore filed in this cause by appellee, Edwin M. Gill, Commissioner of Revenue of North Carolina.

Inasmuch as said motion to dismiss is founded exclusively upon appellee's contention that each of the four assignments of error entered and submitted by the appellant are frivolous and present no substantial Federal question for the decision of this Court, appellant will direct his argu-

ment solely to the merits of the four assignments of error in the order in which they are presented:

I

Assignment of Error Number One

"The Supreme Court of the State of North Carolina erred in failing to find Section 115, Chapter 158 of the public Laws of North Carolina, Session 1939, as amended by Subsection "E" of Section 3, Chapter 50, of the Public Laws of North Carolina, Session 1941, unconstitutional and repugnant to Article I, Section 8 of the Constitution of the United States because said act, as construed and applied by the Supreme Court of the State of North Carolina, exacts of persons, firms, and corporations engaged in the business of purchasing horses and/or mules for resale, in addition to a fixed schedule of annual taxes imposed, an additional tax or fee of $3.00 per head on horses and mules purchased, which additional per head tax only first dealers or consignees receiving horses or mules within the state are absolutely required to pay and from which tax subsequent purchasers for resale or otherwise are relieved, thereby in practical operation and effect exacting an entrance duty, excise or tariff of horses and mules purchased in interstate commerce for import into a non-stock raising state."

The Supreme Court of North Carolina in the decision here subject to review placed the following construction upon Section 115 of the Revenue Act of 1939: (a) that the business of purchasing horses and mules for resale is the business of dealing in horses and mules and as such is taxable by virtue of Article V, Section 3 of the Constitution of North Carolina; (b) that the tax under consideration is a levy on this business for the privilege of engaging therein; and (c) that the additional per head tax is the method

BLEED THROUGH- POOR COPY

adopted by the General Assembly of North Carolina for ascertaining the amount of such tax to be paid, in addition to the annual license tax.

Nesbitt v. *Gill*, 227 N. C. (Adv. Sheets) 174 (1947).

This construction, being a matter of State law, is binding upon this Court.

J. Bacon & Sons v. *Martin*, 305 U. S. 380, 83 L. Ed. 233 (1938);

Supreme Lodge K. P. v. *Meyer*, 265 U. S. 30, 32, 33, 68 L. Ed. 885, 887, 888, 44 S. Ct. 432 (1922);

Hicklin v. *Coney*, 290 U. S. 169, 172, 78 L. Ed. 247, 249, 54 S. Ct. 142 (1933);

Hartford Acc. & Indemn. Co. v. *Nelson Mfg. Co.*, 291 U. S. 352, 358, 78 L. Ed. 840, 845, 54 S. Ct. 392 (1933).

However, it appears to be well established that the construction placed upon an act by the State court "is not determinable of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect."

Richfield Oil, Corp., v. *State Board of Eq.*, — U. S. —, 91 L. Ed. 123, 131 (1946);

St. Louis SW. R. Co. v. *Arkansas*, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 S. Ct. 99 (1914);

Kansas City, Ft. S. & M. R. Co. v. *Botkin*, 240 U. S. 227, 231, 60 L. Ed. 617, 618, 36 S. Ct. 261 (1916).

And in *Gwynn, White & Prince, Inc.*, v. *Henneford*, 305 U. S. 434, 439, 83 L. Ed. 272, 276 (1938), this Court declared unconstitutional and void as to sales made by appellant fruit dealer outside of the State of Washington a gross receipts tax "for the act or privilege of engaging in busi-

ness activities in the state of Washington" and declared in the majority opinion of the court:

> "The present tax, though nominally local, thus in its practical operation discriminated against interstate commerce * * *."

It is submitted that the Supreme Court of the United States does not lack jurisdiction to review the decision of the Supreme Court of a State in which such court construes and declares that a statute levying a license tax applies only to a local business, where as in actual operation and effect such tax as so levied imposes a burden upon interstate commerce.

The appellee contends that the Act as construed by the Supreme Court of North Carolina and as applied to the Appellant, taxpayer, imposes a license tax upon a local dealer for engaging in a local business, and that such construction and application is binding upon this Court.

It is common knowledge that North Carolina is not a stock-raising State. A fact of which this Court may take judicial notice.

P. A. Schulte, Inc. v. *Gangi*, 326 U. S. 712, 90 L. Ed. 1113 (1945);
Parker v. *Brown*, 317 U. S. 341, 87 L. Ed. 315 (1942);
Sligh v. *Kirkwood*, 237 U. S. 52, 59 L. Ed. 835 (1915);
Ohio Bell Telephone Co. v. *Public Utilities Comm.*, 301 U. S. 292, 81 L. Ed. 1093 (1936);
Brown v. *Piper*, 91 U. S. 37, 23 L. Ed. 200 (1875).

And it is a fact recognized by Appellee in its statement against jurisdiction and by the Supreme Court of North Carolina in this case. (*Nesbitt* v. *Gill*, 227 N. C. (Adv. Sheets) 174, 183 (1947) dissent of Barnhill, J.) that substantially all horses and mules bought and sold in North Carolina are originally brought into North Carolina from

BLEED THROUGH- POOR COPY

other States by first dealers and consignees purchasing for purpose of resale.

It is well established that the purchase of an article in one State for transportation to a second State and the actual transportation to the second State constitute Interstate Commerce.

McLeod v. *Dilworth*, 332 U. S. 327, 88 L. Ed. — (1943);
Curren v. *Wallace*, 306 U. S. 1, 83 L. Ed. 441 (1938);
Schafer v. *Farmers Grain Co. of Eubden*, 268 U. S. 189, 69 L. Ed. 909 (1929);
Lemke v. *Farmers Grain Co.*, 258 U. S. 50, 56 L. Ed. 458 (1921).

Thus it is submitted that interstate Commerce is an essential and integral element of the business of purchasing horses and mules for purpose of resale as that business is defined by the Supreme Court of the State of North Carolina.

It is urged by the appellee that any burden imposed on such interstate commerce by the taxing statute "is an incidental consequence of the situation rather than a direct burden resulting necessarily from this operation of the statute."

Dealing in the article here taxed, however, within the definition contained in the taxing statute, consists of two integral and basic elements: purchasing horses and mules for resale, and ultimately selling them. There would be no taxable business without the purchase, which is the measure of the tax.

Obviously, this being true, the rule set forth in the following cases is inapplicable:

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250, 82 L. Ed. 823 (1937);
American Mfg. Co. v. *St. Louis*, 205 U. S. 462, 33 L. Ed. 1087, 39 S. Ct. 522 (1938).

For in each of these cases the business taxed was of purely a local nature and the interstate transactions in which it engaged were quite incidental and in no measure an essential part of the business taxed.

In *Sonneborn Bros.* v. *Keeling*, 262 U. S. 506, 67 L. Ed. 1095 (1922) this Court sustained as constitutional the exaction of a license fee or occupation tax upon a resident merchant which tax was determined on the basis of gross receipts derived from the sale of oil in the taxing State all or a portion of which oil had been imported by the taxpayer from other States.

In that case the license tax imposed upon appellant-taxpayer was a uniform occupation tax imposed upon all wholesale dealers in coal and petroleum oils requiring the payment of a percentage of all gross receipts from all sales made by them within the State.

Similarly this Court has sustained as applicable to receipts from sales of imported goods, wares and merchandise, a uniform State sales tax Act,

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, a State Gross Income Tax Act;

Dept. of Treas. v. *Preserving Corp.*, 313 U. S. 62, 85 L. Ed. 1188 (1940),

and a tax upon the local use and enjoyment thereof collected through the merchant selling the article for local consumption,

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814 (1936);

Nelson v. *Sears Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888 (1940);

General Trading Co. v. *State Tax Comm.*, 322 U. S. 335, 88 L. Ed. 275 (1940).

BLEED THROUGH– POOR COPY

But in each of these cases the tax has applied uniformly to receipts from all sales by wholesale or retail merchants taxed.

Yet, under the statute whose constitutionality is here challenged only first dealers and consignees receiving horses and mules within the State of North Carolina are absolutely required to pay the additional license fee of $3.00 per head on horses and mules purchased for resale. And of the horses and mules so purchased a substantial majority are imported from other States.

This Court and the Supreme Court of North Carolina have repeatedly sustained as constitutional occupation taxes determined and made proportionate to the total number of sales or number of purchases made by the licensed taxpayer where such was a reasonable index of the volume of business done and the value of the privilege licensed.

Armour & Co. v. *Virginia*, 246 U. S. 1, 62 L. Ed. 547 (1918);

Albertson v. *Wallace*, 81 N. C. 479, 103 A. L. R. 26 n (1879).

Where, however, less than the total number of sales or purchases made determines the amount of the license tax or fee and the tax or fee is thus made proportionate to the amount of interstate business done, it is submitted that the tax violates the Commerce Clause of the Constitution of the United States.

Although this Court has repeatedly declared that it is not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their fair share of the State tax burden, it has also stated that "a fair share precludes legislation obviously hostile or practically discriminating toward Interstate Commerce."

International Harvester Company v. *Dept. of Treasury of Indiana*, 322 U. S. 340, 88 L. Ed. 1313 (1943).

It is submitted that a license or occupation tax is vastly different from the gasoline tax declared constitutional by this Court in *Gregg Dying Co.* v. *Query*, 286 U. S. 472, 76 L. Ed. 1232 (1932), which is a use or privilege tax generally appropriated to the maintenance of State highways and collected by the dealer from the ultimate consumer as a charge or tax for the use of State highway facilities.

The Supreme Court of North Carolina has construed and declared the instant tax to be a license or occupation tax. As such it is a tax upon the privilege of engaging in this particular business licensed. It is imposed upon the dealer and borne by the dealer. And unlike the uniform sales or compensating use tax, the dealer does not collect all or any part of the license tax from the ultimate consumer. If the license tax results in an increase in the cost to the consumer of an article dealt in, such increased cost is purely incidental.

It is submitted that of horses and mules purchased for resale in North Carolina by the first dealer to market such horses and mules substantially all are imported from other States; that the instant act imposes an additional license fee only on first dealers purchasing horses and mules for resale, permitting an exemption to dealers in horses and mules on the basis of which a first dealer has previously paid an additional license fee; that the result of this exemption is to tax importers of horses and mules at a higher rate than dealers in local horses and mules; and that the instant act thus discriminates against interstate commerce.

For the effect of the Act, as a tax upon an occupation, or trade, is thus to single out dealers in that trade who engage in interstate commerce for an additional license tax to which dealers engaged solely in local commerce are not exposed.

Such a tax upon an occupation or privilege is repugnant

BLEED THROUGH– POOR COPY

to the Commerce Clause of the Constitution of the United States.

II

Assignment of Error Number Two

> "The Supreme Court of the State of North Carolina erred in failing to find Section 115, Chapter 158 of the Public Laws of North Carolina, Session 1939 as amended by Subsection "E" of Section 3, Chapter 50, of the Public Laws of North Carolina, Session 1941, unconstitutional and repugnant to Article 1, Section 8 of the Constitution of the United States because said act, as construed and applied by the Supreme Court of the State of North Carolina, imposes an unlawful burden upon interstate commerce by imposing a tax upon persons engaged in the business of purchasing horses and mules for purpose of resale, which tax is made proportionate to the total number of horses and mules purchased, including horses and mules purchased in other states, without apportionment, thereby subjecting persons engaged in the business of purchasing for resale horses and mules in interstate commerce to the risk of a multiple tax burden."

This Court has repeatedly declared unconstitutional as applied to interstate carriers State Revenue Acts exacting a fixed percentage of the entire gross receipts of the business without apportionment to the amount of business done within the State.

Galveston H. and S. A. Ry. Co. v. *Texas,* 210 U. S. 217, 52 L. Ed. 1031 (1909);

Meyer v. *Wells, F. & Co.,* 223 U. S. 298, 56 L. Ed. 445 (1912);

Cudahy Packing Co. v. *Minnesota,* 246 U. S. 450, 62 L. Ed. 827 (1918);

Northwest Airlines v. *Minnesota,* 322 U. S. 291, 88 L. Ed. 1283 (1943).

This rule has been applied without regard to whether or not the taxing State was the State of residence of the taxpayer.

Philadelphia & S. M. S. S. Co. v. *Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1203 (1887);
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292, 62 L. Ed. 295 (1917).

Or whether or not the tax was "nominally local" in that it purported to tax a local taxpayer for operating a local business.

Leloup v. *Mobile*, 127 U. S. 640, 32 L. Ed. 311 (1887);
Gwin, White & Prince v. *Henneford, supra.*

Similarly this Court has held that a tax upon the gross receipts of a resident merchant selling all or part of its merchandise in interstate commerce is unconstitutional and void.

J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307, 82 L. Ed. 1865 (1937);
Gwin, White, & Prince v. *Henneford, supra;*
Freeman v. *Hewitt*, 12 L. W. 4077 (U. S. S. Ct. 1946);
Crew Levick Co. v. *Penn.*, 245 U. S. 292, 62 L. Ed. 295 (1917).

Thus, in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 439, 85 L. Ed. 272, 276 (1938) this Court held unconstitutional and void as to sales made by appellant fruit dealer outside of the State of Washington a gross receipts tax "for the act or privilege of engaging in business activities in the State of Washington," stating:

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities in the state. If Washington is free to exact such a tax, other states, to

BLEED THROUGH– POOR COPY

which the commerce extends may with equal right, lay a tax similarly measured for the privilege of conducting within its respective territorial limits the activities there which contribute to the service. The present tax though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple tax burden to which local commerce is not exposed."

Cf. J. D. Adams Mfg. Co. v. *Storen, supra.*

It is submitted that this risk of a "multiple tax burden" is still the guiding test in determining the constitutionality of application of State taxes directly or indirectly tending to burden interstate commerce.

McLeod v. *Dilworth,* 322 U. S. 327, 88 L. Ed. 1304 (1943);

Freeman v. *Hewitt,* 15 L. W. 4077 (U. S. S. Ct. 1946).

It is submitted that the risk of a multiple tax burden exists in as great measure in the instant case where the license fee is measured by purchases and the purchases are made in interstate commerce and to the same extent as in the *Gwin, White, Prince* case where the license fee is measured by gross receipts from sales and the sales are made in interstate commerce.

As has been previously submitted, a substantial portion of the business of dealing in horses and mules as conducted by first dealers and consignees in North Carolina necessarily involves interstate purchase and transportation; the interstate commerce so induced is an essential and integral part of the business taxed; and to this extent the taxpayer is not engaged in a local business over which the State has sole and exclusive control.

Gwin, White, & Prince v. *Henneford, supra;*

J. D. Adams Mfg. Co. v. *Storen, supra;*

Henneford v. *Silas Mason Co., supra.*

Of the three State Use Tax Acts of Iowa, Washington and Indiana, most recently considered by this Court, all three Acts allowed credits for sales taxes paid on the article in the State of origin.

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814 (1937);

Nelson v. *Sears Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888 (1940);

General Trading Co. v. *State Tax Comm.*, 322 U. S. 335, 88 L. Ed. 1309 (1943).

It is respectfully submitted, however, that even were a use tax which made no such exemption sustained by this Court under the rule of *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* that such a decision would not govern the instant case.

The instant Act applies the tax upon purchases uniformly without reference to the place of ultimate sale. No provision is made to allow rebate or readjustment in the event horses and mules taxed to the dealer upon receipt are subsequently sold in other States.

And, moreover, the taxable event considered significant in the *McGoldrick* case is the purchase, in this case effected in Montana. It is submitted that the State of Montana could exact either a sales tax of the horses and mules sold to appellant or a privilege tax upon his business of purchasing horses and mules for resale.

The risk of a multiple and cumulative tax burden is apparent.

And were the license fee imposed by the instant act made proportionate to the number of sales of horses and mules, the tax would be void as to sales effected outside North Carolina.

Gwin, White & Prince v. *Henneford, supra;*

J. D. Adams Mfg. Co. v. *Storen, supra;*

BLEED THROUGH– POOR COPY

Silas Mason Co. v. *Henneford, supra;*
Crew Levick Co. v. *Pennsylvania, supra.*

Inasmuch as the fees here imposed are made proportionate to the total number of purchases of horses and mules, are exacted prior to the sale of such horses and mules, and no provision is made for rebate to the taxpayer in the event such horses and mules are sold in interstate commerce, it is submitted that the Act is void as to purchases effected outside North Carolina.

The General Assembly having elected to impose the tax on the basis of purchases, the incidence of such tax must be limited to such purchases as are not subject to the multiple burden risk, and therefore to purchases which are effected in North Carolina and not such as are effected in other States.

III

Assignment of Error Number Three

"The Supreme Court of the State of North Carolina erred in failing to find Section 115, Chapter 158 of the Public Laws of North Carolina, Session 1939 as amended by Subsection "E" of Section 3, Chapter 50, of the Public Laws of North Carolina, Session 1941, unconstitutional and repugnant to Article I, Section 8 of the Constitution of the United States because said act, as construed and applied by the Supreme Court of the State of North Carolina, exempts purchasers of horses and mules from the payment of the additional tax of $3.00 per head upon horses and mules accepted in part payment of other horses and mules sold, thereby in practical operation and effect permitting and allowing an exemption to local horses and mules not granted to horses and mules produced in foreign states."

It is common knowledge that high freight rates are charged for shipment of livestock and that only by reason of the peculiar advantages of certain western States are horses and mules produced there able to sell at comparatively low prices on the Eastern Seaboard. It is obvious that the great distance separating the western stock-raising States from North Carolina markets effectively prohibits exchange of local horses and mules for horses and mules produced in the western States, at the same time permitting such an exchange locally.

An act which upon its face appears to have universal application, yet in fact imposes an excessive burden, either by its actual direct incidence or by the practical operation of its exemptions and classifications, upon interstate commerce, is unconstitutional and void as to such commerce.

Best & Company v. *Maxwell*, 311 U. S. 454, 85 L. Ed. 275 (1940);

Bethlehem Motors Corporation v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029 (1920);

Caldwell v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336 (1902).

IV

Assignment of Error Number Four

"The Supreme Court of the State of North Carolina erred in refusing to find Section 115, Chapter 158 of the Public Laws of North Carolina, Session 1939 as amended by Subsection "E" of Section 3, Chapter 50, of the Public Laws of North Carolina, Session 1941, unconstitutional and repugnant to Article I, Section 8 of the Constitution of the United States, and Amendment 14 of the Constitution of the United States because as construed and applied to this appellant, said act imposes a state tax upon a transaction consum-

BLEED THROUGH- POOR COPY

mated beyond the territorial limits of the State of North Carolina."

Appellant in error concedes that under the rule of *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 83 L. Ed. 233 (1938) appeal on this assignment of error is foreclosed by the construction placed upon the contested act by the Supreme Court of North Carolina and, therefore, appellant's fourth assignment of error is abandoned.

V

A Substantial Federal Question

In *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 83 L. Ed. 233 (1938), this Court dismissed appeal for writ of error to the Court of Appeals of Kentucky, where, as is disclosed by reference to summary of appellant's brief contained in the official reports of this case, appellant sought to have this Court review the construction placed upon the statute by the State court. In dismissing the appeal this Court stated: "The construction of the statute by the state court is binding upon us."

As has been heretofore stated, appellant does not seek review of the construction placed upon the recent act by the Supreme Court of North Carolina, but does seek review of the constitutionality of the instant act as construed by the Supreme Court of North Carolina as the same is applied to this appellant.

It is submitted that the Supreme Court of the United States is not without jurisdiction to review the decision of the court of final jurisdiction of State upon writ of error where the Federal questions involved are not wholly frivolous.

Chicago, R. I. and Pac. R. Co. v. *Devine*, 239 U. S. 52, 60 L. Ed. 140 (1915);

Hunter v. *City of Pittsburgh*, 207 U. S. 161, 52 L. Ed. 151 (1907);

Offield v. *N. Y., N. H. & H. Co.*, 203 U. S. 372, 51 L. Ed. 231 (1906).

Similarly, it has been held that writ of error will not be dismissed for want of jurisdiction, where a Federal question is clearly raised, merely because the claim by which it is presented is not well founded.

Blythe v. *Hinkley*, 31 S. Ct. 390, 45 L. Ed. 557 (1901).

Nor because it appears that the Supreme Court of the State committed no error in deciding the Federal question involved.

Andrews v. *Andrews*, 188 U. S. 14, 47 L. Ed. 366 (1902).

It is submitted that the Federal questions presented by the instant case have not been specifically treated in this Court by any prior decisions, and that analysis and exposition is necessary to make clear the effect of any prior decisions relating to questions comparable to those presented.

Furthermore, in view of the division of opinion in the Supreme Court of North Carolina on one or more of the Federal questions here presented for determination, it is submitted that even though prior decisions may exist which bear directly upon the Federal questions here presented for review that under the rule stated in *Louisville & Nashville R. Co.* v. *Welton*, 218 U. S. 36, 54 L. Ed. 921 (1909) this Court will not deny jurisdiction.

Appellee suggests that this appeal is barred by reason of the fact that appellant did not petition the Court of North Carolina for rehearing of this cause. It is submitted, however, that failure of a party litigant to petition for rehearing does not deprive the judgment of the State

court of finality so as to preclude writ of error to the Supreme Court of the United States nor does failure of appellant to petition for such rehearing waive or release any rights which he may have to a final determination of the Federal questions involved by the highest court of the land.

Southern Railway Co. v. *Clift*, 260 U. S. 16, 67 L. Ed. 283 (1922);

Andrews v. *Virginia R. Co.*, 248 U. S. 272, 63 L. Ed. 236 (1919);

Chicago, Great Western Ry. Co. v. *Besham*, 249 U. S. 164, 63 L. Ed. 534 (1919).

WHEREFORE, the appellant respectfully submits that this Court does not lack jurisdiction to hear appeal in this cause for writ of error to the Supreme Court of North Carolina and respectfully prays that motion to dismiss this appeal and affirm the judgment of the Supreme Court of the State of North Carolina be denied.

LAMAR GUDGER,
Counsel for Appellant;
SILAS G. BERNARD,
Of Counsel for Appellant.